Wong Goe Chuan v Resolution Alliance Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D24NCC-332–10 OF 2011
HASNAH MOHAMMED HASHIM J
4 MAY 2012

Bankruptcy — Adjudication and receiving orders — Dispute as to sum owed — Redemption sum — Whether entitled to interest — Whether interpretation approach should be literal — Whether s 8(2A) of the Bankruptcy Act 1967 had retrospective effect — Bankruptcy Act 1967 s 8(2A)

The plaintiff was married to Edward Thomas Theseira ('ET Theseira') but through decree nisi, the marriage was dissolved. The decree nisi stipulated that ET Theseira shall transfer his share in the matrimonial property known as HS(D) 4551 PT No 1620 Mukim Kuala Lumpur ('the property') to the plaintiff, subject to the existing charge to Malayan Banking Bhd ('MBB'). However, a receiving and adjudication order was made against ET Theseira on 23 September 1992 before the transfer could be made. In 1992, MBB commenced foreclosure proceedings against ET Theseira and the plaintiff. On 18 April 1994, MBB filed its proof of debt with the official assignee. The amount due from ET Theseira was RM437,049.62. By virtue of s 8(2A) of the Bankruptcy Act 1967 ('Act'), MBB was not entitled to interest on the outstanding amount in excess of six months from the date of the order. On 21 June 2002, MBB wrote to the official assignee that the redemption sum was to be fixed at RM461,783. This was later confirmed by the defendant. However, when the plaintiff offered to redeem the said property, the defendant rejected the offer of settlement and demanded RM761,513.65 instead. The plaintiff submitted that a literal interpretation of the said section would clearly show that MBB and its successor, the defendant were not entitled to any interest on the debt of the failure to realise its security within six months from the date of the receiving order. According to the plaintiff, s 8(2A) did not have a retrospective effect as although the charge was created before the provision came into force, the receiving order was made afterwards. On the contrary, the defendant averred that the redemption sum had lapsed and that it was entitled to the claim of interest beyond the six months limitation under s 8(2A) of the Act since the charge was created before the amendment was made and came into force.

Held, allowing the prayers with costs:

(1) A literal interpretation of s 8(2A) of the Act clearly provided that MBB was not entitled to the interest as MBB failed to realise the security within

six months of the date of the receiving order. The rationale of the section was very clear and unambiguous as it predetermined the maximum interest that can be claimed by a secured creditor from whatever source. This was to prevent secured creditors from claiming unlimited interest on the debt either from the security or from guarantors or sureties (see paras 19–20).

(2) The question of retrospective effect did not arise at all as the receiving order was made when s 8(2A) had already been enforced. The section clearly prohibited the defendant from charging interest in excess of six months from the date of the receiving/adjudication order when the receiving order was made after the coming of the amendment (see paras 21–22).

[Bahasa Malaysia summary

Plaintif telah berkahwin dengan Edward Thomas Theseira ('ET Theseira') tetapi melalui dekri nisi, perkahwinan itu telah dibubarkan. Dekri nisi itu telah menetapkan bahawa ET Theseira hendaklah memindahhak bahagiannya dalam harta perkahwinan dikenali sebagai HS(D) 4551 Pt No 1620 Mukim Kuala Lumpur ('hartanah tersebut') kepada plaintif, tertakluk kepada gadaian sedia ada dengan Malayan Banking Bhd ('MBB'). Walau bagaimanapun, perintah penerimaan dan pengadilan telah dibuat terhadap ET Theseira pada 23 September 1992 sebelum pindah milik itu boleh dibuat. Pada tahun 1992, MBB telah memulakan prosiding perampasan (tebus halang) terhadap ET Theseira dan plaintif. Pada 18 April 1994, MBB telah memfailkan bukti keberhutangannya dengan pemegang serah hak. Jumlah yang perlu dibayar daripada ET Theseira adalah RM437,049.62. Menurut s 8(2A) Akta Kebankrapan 1967 ('Akta'), MBB tidak berhak terhadap faedah ke atas jumlah baki yang melebihi enam bulan dari tarikh perintah itu. Pada 21 Jun 2002, MBB telah menulis kepada pemegang serah hak bahawa jumlah penebusan hendaklah ditetapkan pada RM461,783. Ini kemudian telah disahkan oleh defendan. Walau bagaimanapun, apabila plaintif membuat tawaran untuk menebus hartanah tersebut, defendan menolak tawaran penyelesaian itu dan sebaliknya telah menuntut RM761,513.65. Plaintif berhujah bahawa tafsiran harfiah seksyen tersebut jelas menunjukkan bahawa MBB dan penggantinya, defendan tidak berhak terhadap apa-apa faedah ke atas hutang itu akibat kegagalan untuk merealisasikan gadaiannya dalam tempoh enam bulan dari tarikh perintah penerimaan. Menurut plaintif, s 8(2A) tidak mempunyai kesan kebelakangan sepertimana jika gadaian itu terbentuk sebelum peruntukan itu mula berkuat kuasa, perintah penerimaan itu telah dibuat kemudian. Sebaliknya, defendan menegaskan bahawa jumlah penebusan telah luput dan ia berhak terhadap tuntutan faedah melebihi had enam bulan di bawah s 8(2A) Akta tersebut kerana gadaian itu terbentuk sebelum pindaan dibuat dan mula berkuat kuasa.

Diputuskan, membenarkan permohonan dengan kos:

(1) Tafsiran harfiah s 8(2A) Akta tersebut jelas memperuntukkan bahawa

MBB tidak berhak terhadap faedah itu kerana MBB telah gagal merealisasikan gadaian dalam tempoh enam bulan dari tarikh perintah penerimaan. Rasional seksyen itu amat jelas kerana dapat menentukan faedah maksimum yang boleh dituntut oleh pemiutang bercagar daripada apa-apa sumber. Ini adalah untuk mengelakkan pemiutang bercagar daripada menuntut faedah tanpa had ke atas hutang sama ada daripada gadaian itu atau daripada penjamin-penjamin (lihat perenggan 19–20).

(2) Persoalan berhubung kesan kebelakangan tidak timbul langsung kerana perintah penerimaan telah dibuat apabila s 8(2A) telah pun dikuatkuasakan. Seksyen itu jelas melarang defendan daripada mengenakan faedah melebihi enam bulan dari tarikh perintah penerimaan/pengadilan apabila perintah penerimaan telah dibuat selepas wujud pindaan tersebut (lihat perenggan 21–22).]

Notes

For cases on dispute as to sum owned, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2696–2698.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 284, FC (refd)

CIMB Bank Bhd v Tan Kim Leong Holdings Sdn Bhd & Ors [2010] 8 MLJ 607, HC (refd)

OCBC Bank (M) Bhd v Tan Eng Kwee and another appplication [2003] 6 MLJ 470; [2003] 3 CLJ 161, HC (refd)

RHB Bank Bhd v Ya'akob bin Khalib @ Abdul Ghani bin Muhamad [2008] 1 MLJ 157, CA (refd)

United Overseas Bank (M) Bhd v Mok Hue Huan & Anor [2010] 7 MLJ 293; [2010] 9 CLJ 764, HC (refd)

Legislation referred to

Bankruptcy Act 1967 s 8(2), (2A)
Contracts Act 1950 s 6(b)

Francis Brigged (Francis Brigged & Co) for the plaintiff/respondent.
Jack Yow (Rahmat Lim & Partners) for the defendant/appellant.

Hasnah Mohammed Hashim J:

[1] Enclosure 1 is the originating summons ('OS') filed by the plaintiff for the following declaration and orders:

(a) declaration that the plaintiff is entitled to redeem the property known as

HS(D) 4551 PT No 1620 Mukim of Kuala Lumpur from the defendant by paying to the official assignee the sum of RM461,783;

(b) a declaration that the defendant is bound by the amount stated in the proof of debt and letters of admission by Malayan Banking Bhd and the defendant itself that the redemption sum is RM461,783;

(c) a declaration that as the said Edward Thomas Theseira was adjudicated a bankrupt after the coming into force of the amendment to s 8(2A) of the Bankruptcy Act 1967, the defendant is not entitled to interest on the outstanding sum for a period of more than six months from the date of the receiving and adjudication order; and

(d) an order that upon settlement of the redemption sum, the defendant to deliver the original issue document of title and duly executed and registrable discharge of charge to the official assignee:

(i) an order that upon settlement of the redemption sum, the defendant to deliver the original issue document of title and duly executed and registrable discharge of charge to the official assignee; and

(ii) an order that the official assignee do execute a valid and memorandum of transfer to the plaintiff upon settlement of the redemption sum.

[2] The OS is supported by an affidavit affirmed by Wong Goe Chuan @ Wong Yet Chuan on 29 September 2011.

[3] The affidavits filed and referred to are as follows:

(a) the defendant's affidavit in reply affirmed on 14 November 2011;

(b) the plaintiff's affidavit in reply affirmed on 29 November 2011;

(c) the defendant's affidavit in reply affirmed on 7 December 2011;

(d) the plaintiff's affidavit in reply affirmed on 19 December 2011;

(e) affidavit of the official assignee affirmed on 19 December 2011; and

(f) the defendant's affidavit in reply affirmed on 17 January 2012.

BRIEF FACTS

[4] The plaintiff was at all material times married to Edward Thomas Theseira ('ET Theseira') and on 12 January 1990, a decree nisi was granted by the High Court of Malaya at Kuala Lumpur dissolving the said marriage. It was a term in the said decree nisi that the said ET Theseira shall transfer all his share

in the matrimonial property known as HS (D) 4551 PT No 1620 Mukim Kuala Lumpur, Daerah and Negeri Wilayah Persekutuan to the plaintiff subject to the existing charge to Malayan Banking Bhd ('MBB'). A

[5] However before the said ET Theseira could take steps to transfer property to the plaintiff, a receiving and adjudication order ('RO/AO') was made against ET Theseira on 23 September 1992 in Kuala Lumpur High Court Bankruptcy No D3–29–1278 of 1991. Sometime in 1992, MBB commenced foreclosure proceedings against ET Theseira and the plaintiff (Kuala Lumpur High Court Originating Summons No 54–24–1071 of 1992). B

[6] On 18 April 1994 MBB filed its proof of debt with the official assignee wherein the amount due from the said ET Theseira as at 23 September 1992 was stated as RM437,049.62. On 28 October 2000 the official assignee informed Malayan Banking Bhd that by virtue of s 8(2A) of the Bankruptcy Act 1967, the said bank was not entitled to interest on the outstanding amount in excess of six months from the date of the RO/AO order. C D

[7] Subsequently on 21 June 2002 MBB wrote to the official assignee fixing RM461,783 as the redemption sum. E

[8] By letter dated 9 June 2008, the said E.T Theseira was informed by the defendant that by a vesting order dated 17 April 2008, the loan due to MBB had been transferred to and vested in the defendant. On 12 August 2008 the said defendant had confirmed that the redemption sum was RM461,783. On 28 January 2009 the official assignee then wrote to the defendant requesting for the amount outstanding as at 23 September 1992. The official assignee allowed the plaintiff to redeem the said property from the defendant and by a letter dated 22 October 2010, the plaintiff offered to redeem the said property for the sum of RM461,783. However on 15 November 2010 the defendant rejected the offer of settlement and instead demanded for a sum of RM761,513.65 as at 4 November 2010. F G

[9] Under the decree nisi, the said property is to be transferred to the plaintiff thereby giving him a vested interest in the property. The defendant is bound by the proof of debt filed by MBB fixing the outstanding sum at RM461,783 inclusive of interest. ET Theseira was adjudged a bankrupt after the amendment to s 8(2A) of the Bankruptcy Act on 17 July 1992 and therefore the defendant is not entitled to interest in excess of six months from the date of the RO/AO. H I

THE PLAINTIFF'S SUBMISSION

[10] It is the submission of learned counsel for the plaintiff that a literal

interpretation of the said section would clearly show that MBB and its successor, the defendant were not entitled to any interest on the debt of the failure of MBB to realise its security within six months from the date of the RO. Learned counsel referred to *United Overseas Bank (M) Bhd v Mok Hue Huan & Anor* [2010] 7 MLJ 293; [2010] 9 CLJ 764 and *OCBC Bank (M) Bhd v Tan Eng Kwee and another appplication* [2003] 6 MLJ 470; [2003] 3 CLJ 161. In the *OCBC* case Low Hop Bing J (as he then said that):

> The phrase 'Notwithstanding sub-s (2)' in s 8(2A) means that s 8(2) is to be disregarded in so far as it is inconsistent with s 8(2A) so that the provisions of s 8(2A) shall prevail and play a predominant role to the exclusion of s 8(2) which has been rendered subservient to s 8(2A).
>
> The word 'realise' in s 8(2A) means 'convert into money' (see the *Concise Oxford Dictionary* (9th Ed)).
>
> That being the case, the plaintiff as a secured creditor under s 8(2A) shall not be entitled to any interest in respect of the debt after the making of the receiving order on 4 October 2001 if the plaintiff did not on or before 4 April 2002 convert into money the security ie, the land charged to the plaintiff. The act of converting into money is the act of receiving payment of the proceeds of sale from the successful bidder pursuant to the order for sale. This does not appear to be the case here and so after the making of the receiving order on 4 October 2001, the plaintiff is not entitled to any interest in respect of the debt in question.

[11] Counsel for the plaintiff further submits that s 8(2A) does not have retrospective effect as although the charge was created before the coming into force of the provision the RO was made thereafter.

[12] It is the submission of the plaintiff that the defendant is estopped from claiming interest after the date of the RO for the following reasons:

(a) MBB had filed its proof of debt on 18 April 1994 stating that the amount owed was RM437,049.62 inclusive of interest and cost as at the date of the RO;

(b) the OA wrote to MBB on 28 October 2000 informing that it was not entitled to interest six months after the date of the RO. MBB did not object; and

(c) MBB wrote to the OA on 21 June 2003 stating that the redemption sum was RM461,783 16 years after the RO.

[13] Therefore by virtue of the admission made by MBB as to the amount owing and subsequent confirmation by the defendant, the defendant is estopped from claiming a sum higher than what was previously agreed. Further it is submitted that the plaintiff was not in a position to settle the redemption sum by the date stated in the defendant's letter dated 12 August 2008 as she had

not obtained permission from the OA to redeem the property, (*Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 284).

[14] In the present case from 1992 until 2010 MBB and its successor the defendant asserted that the outstanding was RM461,783. It was only in 2010 the defendant demanded a higher amount.

THE DEFENDANT'S SUBMISSION

[15] It is submitted that the redemption sum stated in the defendant's letter dated 12 August 2008 has lapsed since payment as required to be made on or before 31 October 2008. The time prescribed offering the redemption had lapsed. Since the defendant's offer had prescribed the time for the payment of the redemption sum then s 6(b) of the Contracts Act 1950 shall apply and the offer or proposal is therefore revoked. No payment was made the defendant is entitled to revoke and proceed with legal action for recovery of the total balance outstanding inclusive of interest. Learned counsel referred to the case of *CIMB Bank Bhd v Tan Kim Leong Holdings Sdn Bhd* [2010] 8 MLJ 607.

[16] With regards to interest in respect of the charge it is further submitted the defendant is entitled to claim interest beyond the six months limitation under s 8(2A) of the Act as the charge was created before the amendment was made and came into force. The Court of Appeal in *RHB Bank Bhd v Ya'akob bin Khalib @ Abdul Ghani bin Muhamad* [2008] 1 MLJ 157 said that s 8(2A) of the Act was not intended to be retrospective.

Whether s 8(2A) of the Bankruptcy Act 1967 allows the defendant to charge interest in excess of six months from the date of the RO/AO when the said orders were made after the coming of the Act

[17] Section 8(2A) of the Bankruptcy Act 1967 ('the Act') provides:

> (2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

[18] Section 8(2) reads:

> This section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed — nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of the provisions

of section 31of the Employment Act, 1955 of the States of West Malaysia or any corresponding provisions in Sabah and Sarawak.

[19] MBB became a secured creditor on 28 November 1983 and ET Theriesa was adjudicated a bankrupt a literal interpretation of s 8(2A) of the Act clearly provides that MBB and the defendant are not entitled to interest as MBB failed to realise the security within six months from the date of the RO. Learned counsel referred to the case of *United Overseas Bank (M) Bhd v Mok Hue Huan & Anor* [2010] 7 MLJ 293; [2010] 9 CLJ 764 where Mohamad Zawawi J said that s 8(2A) of the Act is a '… 'statutory clamp' on secured creditors prohibiting them from claiming any further interest on the debt after the statutory period. There is no exception to the said section'. His Lordship also referred to the Hansard of Parliament dated 14 May 1992 and 2 June 1992 where the debate of the proposed amendements to the Act was reported as follows:

> … dibuat kepada *Seksyen 8* bagi memperuntukkan bahawa tiada apa-apa bunga boleh dibayar kepada pemiutang bercagar jika sekiranya pemiutang tersebut gagal menghasilkan cagarannya dalam tempoh 6 bulan dari tarikh perintah penerimaan dibuat. Rasionalnya ialah pada amalan biasa dan berdasarkan peruntukan yang sedia ada, didapati segolongan pemiutang bercagar mengambil masa yang terlalu lama untuk menghasilkan harta tersebut. Manakala, bunga yang perlu dibayar oleh penghutang berterusan sehinggalah jualan dilaksanakan. Perbuatan sedemikian adalah tidak adil kepada pemiutang yang tidak bercagar dan juga kepada penghutang.

[20] The rationale behind s 8(2A) of the Act is very clear and unambiguous. The section predetermine the maximum interest that can be claimed by a secured creditor from whatever source. This is to prevent secured creditors from claiming unlimited interest on the debt either from the security or from the guarantors or sureties.

[21] Section 8(2A) of the Act came into force on 17 July 1992. In the instant case, as the RO was made on 23 September 1992, when s 8(2A) has already been in force therefore the question of giving retrospective effect does not arise at all. Hence, s 8(2A) would apply with full force. The crucial factor to consider is under this provision is when the RO was made as it is clearly provided that '… no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order …'.

[22] Therefore s 8(2A) of the Act clearly prohibits the defendant to charge interest in excess of six months from the date of the RO/AO when the RO was made after the coming of the amendment. As Low Hop Bing J (as he them was) in *OCBC Bank (Malaysia) Bhd v Tan Eng Kwee* said '… it is incumbent on the

court to give effect to the intention of Parliament which in its wisdom has expressly enacted in clear and unambiguous terms'.

[23] Based on the reasons encl 1 prayer (1), (3), (4) and (5) is allowed with cost of RM3,000.

Prayers allowed with costs.

Reported by Ibnu Aswan